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Top Product Liability Cases Of 2021: Midyear Report

By **Emily Field**

Law360 (June 25, 2021, 9:50 AM EDT) -- A U.S. Supreme Court ruling holding that Ford can be held liable for alleged defects in cars originally sold outside a plaintiff's home state and a ruling wiping out hundreds of cases alleging GlaxoSmithKline's anti-nausea drug Zofran causes birth defects are among Law360's top cases for the first six months of 2021.

And while not a ruling, the high court's refusal to hear Johnson & Johnson's appeal in a talc case leaves in place a headline-grabbing $2.1 billion verdict awarded to 22 women who claimed J&J talc products caused their cancer.

Here, Law360 sums up some of the most significant rulings and verdicts so far this year.

Ford Loses High Court Appeal

The U.S. Supreme Court's late March ruling elucidated the limits of specific personal jurisdiction when it found that Ford Motor Co. can be sued in Montana and Minnesota over accidents involving used cars that were initially sold out-of-state with allegedly defective tires or airbags.

The unanimous ruling was a win for plaintiffs and dealt a blow to Ford, which sought to reverse a pair of 2019 decisions from the Montana Supreme Court and Minnesota Supreme Court that kept alive lawsuits from residents who were injured in 2015 accidents in those states.

In the decision, the justices said there were enough connections between the plaintiffs' claims and Ford's business activities in the states for it to be sued there. Those activities include the company extensively marketing, selling, repairing and maintaining Ford vehicles, including Explorers and Crown Victorias, in Minnesota and Montana.

"In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those states," Justice Elena Kagan wrote in the court's opinion. "So there is a strong 'relationship among the defendant, the forum, and the litigation' — the 'essential foundation' of specific jurisdiction."

At the time of the ruling, plaintiffs' attorney Deepak Gupta of Gupta Wessler PLLC told Law360 it was the first time since the 1980s that plaintiffs have won a personal jurisdiction case before the Supreme Court.

Alexandra Cunningham of Hunton Andrews Kurth LLP said, "The plaintiffs bar is now actively raising Ford Motor as a basis for reestablishing attempts at jurisdiction in a variety of forums."

"We've seen this case now come up repeatedly in motions to reconsider orders of dismissal on jurisdiction that have been in place for years, so it'll be interesting to see how that decision plays out in the court over the coming years," she added.

The cases are Ford Motor Co. v. Montana Eighth Judicial District Court et al., case number 19-368, and Ford Motor Co. v. Adam Bandemer, case number 19-369, both in the Supreme Court of the United States.

Mixed Verdicts In 3M Earplug MDL

The third and latest bellwether in the multidistrict litigation — the nation's largest — over alleged hearing loss from 3M's combat earplugs culminated in a $1.7 million verdict on June 18 for a former infantryman and machine gun runner.

It was the second defeat for 3M after it lost the first trial, in which a jury found the company was responsible for three service members' juries and awarded them a total of $7.1 million. 3M won the second trial.

"It is a hugely important litigation," said Alezandra Lahav of the University of Connecticut School of Law. "First, it is of course the largest MDL ever, with hundreds of thousands of claims. Second, the bellwether trial procedure has had high variability, leaving open the question of how to determine value in the underlying cases."

The MDL, which includes suits brought by 220,000 veterans and service members, was initially created in April 2019, and has proceeded rapidly to the bellwether trial stage.

The suits claim 3M and a predecessor, Aearo LLC, supplied "CAEv2" earplugs that were defective and didn't protect against service-related tinnitus and hearing loss.

3M contends the military bears some responsibility for how the earplugs were designed and delivered.

But while the military had some influence on the earplug, since the Army made it clear it would only buy it if it could be worn under a helmet and stored in a military traveling case, U.S. District M. Casey Rodger ruled that 3M can't tell juries the government dictated or approved any aspect of the earplug's design or its instructions and warnings.

There are two more cases set for trial in the fall in another bellwether group, and the judge said she is leaning toward consolidating three more for trial in January 2022, according to a recent filing.

The MDL is 3M Combat Arms Earplug Products Liability Litigation, case number 3:19-md-02885, in the U.S. District Court for the Northern District of Florida.

GSK Gets Zofran MDL Knocked Out

In a ruling a Massachusetts federal judge had hinted would be a "showstopper," GlaxoSmithKline in early June was freed from more than 420 suits in an MDL alleging its anti-nausea drug Zofran causes

birth defects.

U.S. District Judge F. Dennis Saylor IV ruled the claims were preempted because the U.S. Food and Drug Administration declined to add a warning for pregnant women, putting an end to the MDL before the first bellwether was scheduled to start in October.

In 2019, Judge Saylor denied an earlier summary judgment motion and said a jury should decide whether the claims were preempted. But the U.S. Supreme Court's ruling in Merck v. Albrecht later that year held that judges, not juries, should decode the U.S. Food and Drug Administration's regulations on warning labels.

In the June 1 order, Judge Saylor said the FDA has been asked repeatedly about a warning label for pregnant women and had rejected adding that language, even though the agency has been aware that Zofran has been prescribed off-label to pregnant women for years.

"There is no question that the FDA is now fully informed of all relevant information concerning the safety of the drug. And the FDA has made the determination that a label change is not warranted," the judge wrote. "Thus, the FDA, acting pursuant to the duty imposed on it by federal law, has rejected the pregnancy warning label that plaintiffs insist was required by state law at the time of the alleged injuries."

The mothers' suits claiming their Zofran use during pregnancy caused their children to be born with birth defects, including heart issues, were consolidated in 2015. Zofran was first approved in 1991 for the treatment of nausea induced by chemotherapy or post-surgery vomiting.

The case is In re: Zofran (Ondansetron) Products Liability Litigation, case number 1:15-md-02657, in the U.S. District Court for the District of Massachusetts.

Ninth Circuit Backs $25M Roundup Verdict

Bayer AG's second appellate setback over Roundup came on May 14, when the Ninth Circuit upheld a $25 million judgment in the first bellwether trial in multidistrict litigation over claims the company's weedkiller causes cancer, holding the plaintiff's failure-to-warn claims are not blocked by federal law.

In a unanimous, unpublished opinion, the panel said Edwin Hardeman's California state failure-to-warn claims are not preempted by the Federal Insecticide, Fungicide and Rodenticide Act because the laws have parallel requirements.

Under the federal law, a pesticide label must include a warning "adequate to protect health and environment" in order to avoid being considered misbranded in violation of the law, the panel said. And the Golden State common law holds that manufacturers warn about known risks or risks that a "reasonably prudent" manufacturer would know about, according to the opinion.

The ruling was the first federal appellate loss for Bayer AG subsidiary Monsanto over Roundup, following a California appeals court's decision not to throw out a $21 million jury verdict in 2020 in favor of school groundskeeper Dewayne Johnson.

The case is Edwin Hardeman v. Monsanto Co., case numbers 19-16253, 19-16255, 19-16636 and 19-16708, in the U.S. Court of Appeals for the Ninth Circuit.

Future Roundup Claims Rejected

Also in May, a $2 billion deal meant to cover claims brought in the future over Roundup failed to win the approval of a California federal judge who had been skeptical about whether a past version of the settlement was fair enough.

U.S. District Judge Vince Chhabria said a week after a hearing on the settlement that while it accomplished a lot for Monsanto, it was "clearly unreasonable" for a group of Roundup users who have not yet developed non-Hodgkin's lymphoma.

The deal was designed to cover claims brought in the future by either Roundup users with cancer who have not yet hired a lawyer or users who have been exposed to Roundup but haven't yet developed cancer.

Of particular concern for the judge was the long amount of time it can take to develop non-Hodgkin's lymphoma and the high risk that a claimant could develop cancer after the four-year-long compensation program had run out.

Claimants would be eligible for a medical monitoring program and could still opt out of the compensation program to sue Monsanto, but in return for those benefits, these future plaintiffs didn't get much in return, the judge said in denying approval.

For one, they would have to give up their right to seek punitive damages, which is a large amount of money to leave on the table considering the millions awarded in past Roundup trials, the judge said.

Also, an opinion rendered by a panel of scientists on the issue of whether Roundup causes cancer could be used in court by either party.

While that might not sound like a bad trade-off for the plaintiffs, Monsanto wants a science panel because it has lost three trials and the issue of expert testimony on causation and Roundup currently favors plaintiffs, Judge Chhabria said.

The deal announced in February would have provided up to $200,000 each for people who were exposed to Roundup and diagnosed with non-Hodgkin's lymphoma. It also would have set aside $50 million to a fund for payments above that for "extraordinary" cases.

But other plaintiffs lawyers and firms fired off objections to the deal, particularly over the creation of the science panel and the difficulty of even reaching these plaintiffs, who are overwhelmingly transient farmworkers who may not speak English or have heard of the disease.

"This is a pretty stark example of the dynamics of the courts coming in and trying to ensure that the settlement addresses not just what the company wants and not what the plaintiffs lawyers want, but also what it thinks is best for the plaintiffs," Andrew Kaplan of Crowell & Moring LLP said.

The MDL case is In re: Roundup Products Liability Litigation, case number 3:16-md-02741, in the U.S. District Court for the Northern District of California.

High Court Passes On J&J Talc Appeal

The Supreme Court's June refusal to hear Johnson & Johnson's appeal in a talc case left in place a $2.1 billion verdict awarded in Missouri to nearly two dozen women who blamed the purported asbestos in its talcum powder for their ovarian cancer.

It was another appellate loss for J&J, as the decision came almost seven months after the Missouri Supreme Court declined to review the matter.

The refusal is "hugely important" for the future of ovarian cancer and mesothelioma talc litigation as far as causation goes, said Don Migliori of Motley Rice LLC, whose firm represents talc plaintiffs.

"There are thousands and thousands of people still in the system, [so] that verdict supports and helps," Migliori said. "That's certainly an important U.S. Supreme Court refusal to get involved with the verdict."

One of J&J's arguments was that consolidating claims from 22 women violated the company's due process rights and that the Show-Me State's trial court lacked personal jurisdiction over plaintiffs who neither lived in Missouri nor purchased or used the products there.

Almost three years prior, jurors awarded a combined $550 million and $4.14 billion in compensatory and punitive damages respectively against J&J and a subsidiary over claims their talcum powder products contained asbestos and caused the women to develop ovarian cancer.

Then in June 2020, a Missouri appeals court slashed about $2.6 billion from the verdict, including by tossing the awards for two out-of-state plaintiffs on jurisdictional grounds because they only used a product made in Georgia.

The appeal was J&J's shot at persuading the high court to set a cap on juries' ability to set punitive damages, an issue that last came before the court in 2009 in an appeal in a tobacco case that the court ultimately concluded it shouldn't have agreed to hear, leaving in place a nearly $80 million verdict against Philip Morris.

The case is Johnson & Johnson et al. v. Gail L. Ingham et al., case number 20-1223, in the Supreme Court of the United States.

--Editing by Marygrace Murphy and Alyssa Miller.
